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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
CROW ROOFING & SHEET METAL, INC., )  
Appellant, )  
v. )  
PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )  
Respondent. )

PCHB Nos. 78-128, 78-129  
and 78-130

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

These matters, the consolidated appeals of three \$250 civil penalties for the alleged violation of Sections 9.03 and 9.11 of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith and David Akana, (presiding) in Seattle on October 10, 1978.

Appellant was represented by its attorney, John R. Martin, Jr.; respondent was represented by its attorney, Keith D. McGoffin.

Respondent moved to dismiss the appeals in the above entitled matter for appellant's failure to serve respondent with the notice of

DAA/LB

1 appeal. The affidavits submitted show that the notices of appeal  
2 were timely mailed by appellant but not received by respondent. This  
3 Board's jurisdiction is vested upon timely receipt of an appeal by an  
4 appellant and is not divested by nonreceipt of an appeal by respondent.  
5 The motion to dismiss should be and is denied. Actual receipt of  
6 an appeal by respondent is required before the ten days in which  
7 respondent may request a formal hearing begins to run. Respondent,  
8 having never received any notice of appeal, may at this time request  
9 a formal hearing, and, according to RCW 43.21B.230, our proceeding must  
10 be conducted as such.

11 Appellant filed a memorandum; counsel made opening statements.

12 Having heard the testimony, having examined the exhibits and  
13 having considered the contentions of the parties, the Pollution Control  
14 Hearings Board makes these

15 FINDINGS OF FACT

16 I

17 Pursuant to RCW 43.21B.260, respondent has filed a certified  
18 copy of its Regulation I and amendments thereto which are noticed.

19 II

20 Appellant, Crow Roofing and Sheet Metal, Inc., is located at  
21 9500 Aurora Avenue North in Seattle, Washington. It has been in the  
22 vicinity of, or at, its present location since 1951. As a part of its  
23 business, appellant provides sealing membranes for building roofs at  
24 various job sites in the vicinity of Seattle. In the ordinary course  
25 of such business, it transports heated asphalt to job sites in  
26 tankers.

27 FINAL FINDINGS OF FACT,  
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1 III

2 In 1975 appellant began replacing its asphalt kettles with tankers.  
3 The use of tankers has allowed appellant to reduce air pollution and  
4 save energy. Appellant continues to keep kettles in its inventory for  
5 use at places where a tanker is not suitable.

6 IV

7 Appellant maintains an office, shop, and storage shed on its  
8 property. The shop portion of the premises is used to park its  
9 equipment, trucks, kettles, and tankers. Appellant owns five tankers  
10 of various capacities, including one 15-ton, two 6-ton, and two 3-ton  
11 tankers. The 15-ton tanker is used to pick up and store hot, liquid  
12 asphalt and is now parked on the northern boundary of the premises  
13 near a relocated source of 440 volt electricity.

14 While parked at the premises, an electric heater in each of the  
15 6 and 15-ton tankers keeps any asphalt contained therein liquid. The  
16 3-ton tankers are not electrically heated. Ordinarily, the 6-ton tankers and  
17 the 3-ton tankers are used at job sites. These tankers are filled with  
18 asphalt from the 15-ton tanker. When transferring products, asphalt is  
19 pumped from one tanker to another through a 2-inch hose which is placed  
20 through a 12-inch diameter opening of the receiving tanker. Emissions  
21 which occur in the instant matters come from this opening during the  
22 transfer operation.

23 V

24 Appellant's business is located in an area zoned general commercial  
25 by the City of Seattle. Immediately adjacent to the southern boundary  
26 of appellant's property is the Central Trailer Park, part of which is

1 also in the general commercial zone and has been located there for many  
2 years.

## 3 VI

4 On two recent occasions, when the wind blew from the north, occupants  
5 of one residence in the trailer park complained to respondent about the  
6 asphalt odor during appellant's transfer operations. In response to each  
7 of these complaints, respondent dispatched an inspector to make an  
8 investigation. On May 17, 1978 at about 6:35 p.m. in response to a  
9 complaint of odor, respondent's inspector visited complainant's trailer  
10 which is located about five feet from appellant's south property line.  
11 A strong odor of asphalt was noticed both inside and outside of  
12 complainant's trailer. The source of the odor was emissions  
13 escaping during the transfer of asphalt from appellant's large tanker  
14 to a smaller tanker. The inspector experienced burning eyes and nose.  
15 He described the odor to be of such character as to make him want to  
16 avoid the area. Complainant reported a headache, lung congestion and  
17 smarting of her eyes. For the foregoing occurrence appellant was  
18 issued a notice of violation by certified mail for allegedly violating  
19 Section 9.11(a) of Regulation I from which followed a \$250 civil penalty  
20 and the first appeal (PCHB No. 78-128).

## 21 VII

22 On May 18, 1978 at about 7:25 p.m. in response to a complaint of  
23 odor, respondent's inspector again visited complainant's trailer and  
24 noticed a strong asphalt odor from appellant's property which made  
25 him want to avoid the area. He noted it as number three on a scale of  
26 0 to 4, commonly used by the agency in rating severity of odors. The

1 odor was found both inside and outside of the complainant's trailer and  
2 caused the inspector's eyes and nose to burn. Complainant reported a  
3 headache, burning nose and burning eyes. Respondent's inspector watched  
4 asphalt being transferred from one tanker to another. He took several  
5 photographs of a white-colored smoke emission and recorded an opacity  
6 of 35 to 50 percent from appellant's tanker for 5-1/4 minutes during a  
7 six minute observation period. For the foregoing occurrence, appellant  
8 was issued two notices of violation by certified mail, one for  
9 allegedly violating Section 9.03(b) (2) and another for violating Section  
10 9.11(a) of Regulation I, and for which a \$250 civil penalty for each  
11 violation was assessed and here appealed (PCHB Nos. 78-129 and 78-130).

#### 12 VIII

13 The evaluation of odors by an inspector is a matter of judgment  
14 based upon his physical reactions.

#### 15 IX

16 Testimony indicates that appellant's employees are not affected by  
17 the asphalt: they do not experience watery eyes, headaches, coughs,  
18 tight chests, or other adverse reactions. Appellant's management has not  
19 heard employees complain of adverse reactions from asphalt odor.

#### 20 X

21 Appellant uses the newest and best available equipment for its  
22 business and has taken significant measures in an attempt to reduce odor  
23 from its transfer operations. In the spring of this year, before  
24 the instant occurrences, appellant moved its 15-ton tanker 100 feet north  
25 of its prior location and rerouted electric lines at a cost of \$616. Also,  
26 a large plastic screen has been relocated on the northern boundary.

1 Appellant has expended \$500-\$600 in labor costs to relocate its tanker and  
2 facilities. Appellant also covers tanker openings with a burlap sack to  
3 reduce emissions during transfer operations.

4 XI

5 Since appellant has switched from kettles to tankers, the owners  
6 of the surrounding business activities nearby appellant's premises  
7 have not complained of unpleasant asphalt odors.

8 XII

9 Any Conclusion of Law which should be deemed a Finding of Fact  
10 is hereby adopted as such.

11 From these Findings come the following

12 CONCLUSIONS OF LAW

13 I

14 Section 9.11(a) of respondent's Regulation I provides that:

15 It shall be unlawful for any person to cause or  
16 permit the emission of an air contaminant or water  
17 vapor, including an air contaminant whose emission is  
18 not otherwise prohibited by this Regulation, if  
19 the air contaminant or water vapor causes detriment  
20 to the health, safety or welfare of any person, or  
21 causes damage to property or business.

19 Section 9.03(b) (2) of respondent's Regulation I provides that:

20 "(1)t shall be unlawful for any person to cause  
21 or allow the emission of any air contaminant  
22 for a period or periods aggregating more than  
23 three (3) minutes in any one hour, which is:

23 . . . .

24 (2) Of such opacity as to obscure an observer's  
25 view to a degree equal to or greater than does  
26 smoke [which is darker in shade than that  
designated as No. 1 (20% density) on the  
Ringelmann Chart] . . . ."

1 II

2 Asphalt odor and visible emissions are an "air contaminant"  
3 within the meaning of Section 1.07(b) of Regulation I. RCW 70.94.030(1).  
4 The presence in, or "emissions" (RCW 70.94.030(8)) into, the outdoor  
5 atmosphere of such air contaminant "in sufficient quantities and of  
6 such characteristics and duration as is, or is likely to be, injurious  
7 to human health, plant or animal life, or property, or which unreasonably  
8 interferes with enjoyment of life and property" is air pollution.  
9 Section 1.07(c and j). RCW 70.94.030(2).

10 III

11 There is no requirement in issuing a notice of violation or in  
12 assessing a penalty under Section 3.29 of Regulation I that the violation  
13 be "knowingly" caused or permitted. E.g. Kaiser Aluminum, et al. v.  
14 PSAPCA, PCHB No. 1017.

15 IV

16 Sections 9.11 and 9.03 are within the authority granted respondent  
17 by the Clean Air Act. RCW 70.94.141; 70.94.331; 70.94.380. Moreover,  
18 respondent must adopt regulations which are no less stringent than  
19 state standards. RCW 70.94.380. In implementing the Act, the state  
20 has adopted regulations which appear to be embodied in respondent's  
21 regulations. Chapter 18.04 WAC (superseded by chapter 173-400 WAC).

22 V

23 The evidence presented was that respondent's inspector and  
24 complainants in the trailer park noticed an objectionable odor  
25 which caused them to suffer certain adverse physical effects when the  
26 wind came from appellant's location. Other evidence presented was

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 that appellant's employees did not report that the odor was objectionable.  
2 Whether a violation of Section 9.11 has occurred under such circumstances  
3 is necessarily a subjective determination. The Agency must show by  
4 a preponderance of the evidence that an air contaminant caused detriment  
5 to the health, safety or welfare of any person or caused damage  
6 to property or business. The fundamental inquiry is whether the air  
7 pollution is of such characteristics and duration as is, or is likely to be,  
8 injurious to human health, plant or animal life, or property, or which  
9 unreasonably interferes with enjoyment of life and property. Cudahy Co.  
10 v. PSPACA, PCHB No. 77-98 (1977). In weighing the evidence in these  
11 matters, there is adequate proof that an unreasonable interference  
12 with enjoyment of life and property, was caused or allowed to others  
13 by appellant at each of the times and dates alleged. As such,  
14 appellant was shown to have violated Section 9.11(a) of Regulation I.  
15 Two \$250 civil penalties (Nos. 3842 and 3843) assessed for these violations  
16 were proper and each should be affirmed.

17 VI

18 Appellant violated Section 9.03(b)(2) of Regulation I on  
19 May 18, 1978 by causing or allowing the emission of an air  
20 contaminant for a period aggregating more than three minutes in  
21 any one hour which was greater than 20 percent opacity. The \$250  
22 civil penalty (No. 3844) assessed therefor was proper and should be  
23 affirmed.

24 VII

25 The attack by counsel for appellant upon the wisdom of Section 9.11(a)  
26 is more properly addressed to the Board of Directors of the Puget Sound



1 Air Pollution Control Agency and/or the State Department of Ecology. In  
2 the alternative, appellant may also wish to consider applying for a  
3 variance from the applicable rules from the PSAPCA Board as suggested  
4 above. To change a rule, or to allow a variance from the rules, is not  
5 the function of this Board.

6 Appellant has made good faith efforts to avoid a reoccurrence of  
7 this problem through relocation of the emissions source. However, it has  
8 made only rudimentary attempts to suppress emissions at the source and  
9 has not studied the feasibility of capturing and filtering emissions at  
10 the source. A variance from the regulations may afford appellant an  
11 opportunity to conduct such a study.

12 The Board, wishing to see a termination of civil penalties assessed  
13 on appellant and a reasonable solution to appellant's emission problem,  
14 concludes that each of the instant penalties should be suspended if  
15 appellant applies for a variance from the regulations to investigate and  
16 install, if appropriate, feasible control equipment.

#### 17 VIII

18 Respondent's Section 3.05(b) does not require notice to appellant  
19 that an investigation of an alleged violation is about to occur.

#### 20 IX

21 This Board has no jurisdiction to decide substantive constitutional  
22 issues and must presume statutes and regulations to be constitutional.  
23 See Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257 (1975).

#### 24 X

25 Appellant's remaining contentions are without merit.

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
27 AND ORDER

XI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

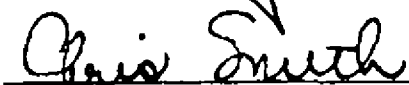
ORDER

Each civil penalty is suspended on condition that appellant applies for a variance from the appropriate sections of Regulation I within 45 days from the date of this Order.

DATED this 27<sup>th</sup> day of October, 1978.

POLLUTION CONTROL HEARINGS BOARD

  
DAVE J. MOONEY, Chairman

  
CHRIS SMITH, Member

  
DAVID AKANA, Member

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER